SANITIZED DEC. – 02-465 SV – BY R. MICHAEL REED – ISSUED – 09/12/03 – SUBMITTED FOR DECISION ON BRIEFS – 03/12/03

SYNOPSIS

PRIVILEGE TAX ON PROVISION OF CERTAIN HEALTH CARE SERVICES – IMPOSITION OF TAX – As applicable to this taxpayer, W. Va. Code § 11-13A-3(a), which imposes a privilege tax on the provision of "certain health care services," imposes the tax on "behavioral health services" provided by the taxpayer.

PRIVILEGE TAX ON PROVISION OF CERTAIN HEALTH CARE SERVICES – DEFINITION OF "BEHAVIORAL HEALTH SERVICES -- W. Va. Code § 11-13A-2(d)(1), which defines "behavioral health services," limits imposition of the privilege tax to "health care related services" provided by a "behavioral health center."

PRIVILEGE TAX ON PROVISION OF CERTAIN HEALTH CARE SERVICES – PORTION OF GROSS INCOME THAT IS SUBJECT TO THE TAX -- W. Va. Code § 11-13A-2(d)(1), which defines "behavioral health services," permits imposition of the privilege tax only on that portion of the gross income of a behavioral health center that is derived from the provision of "health care related services," and not on its entire gross income.

FINAL DECISION ON ISSUES

This matter is before the Office to Tax Appeals upon a petition for reassessment filed by the taxpayer in accordance with the provision of W. Va. Code § 11-10A-9(a).

PROCEDURAL HISTORY

The Auditing Division issued an assessment against the Petitioner for the tax on the privilege of providing certain health care services. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 13A of the West Virginia Code. The assessment was for the period of January 1, 1998, through December 31, 2001, for tax and interest, computed through May 1, 2002. Written notice of this assessment was served on the Petitioner.

Thereafter, the Petitioner timely filed a petition for reassessment with the then Office of Hearings and Appeals of the West Virginia State Tax Department. Subsequently, a notice of a hearing on the petition was sent to the Petitioner. A hearing was held in accordance with the provisions of W. Va. Code § 11-10-9.

On or about December 31, 2002, pursuant to the authority set forth in W. Va. Code § 11-10-9, this matter was transferred to the docket of this tribunal, the West Virginia Office of Tax

Appeals ("WVOTA"). This matter was submitted for decision upon completion of the briefing schedule.

FINDINGS OF FACT

With the exception of a single adjective, which is used three times, the parties are in agreement that the following statement constitutes a description of the services provided by the Petitioner-taxpayer:

> [Petitioner] is a licensed behavioral health services provider of residential-habilitation and day-habilitation support services to individuals who live in regular community settings and require some assistance with living in those environments. (Tr. at 20, 21). In other words, [Petitioner] trains, supports and supervises direct service staff in providing assistance to individuals who without that assistance and supervision would not be able to live in the community. (Tr. at 27).
>
> [Petitioner] provides services under the Title XIX Mental Retardation Developmental Disability Waiver Program. (Tr. at 21) [sic] [Petitioner's] services include transportation (Tr. at 34, 59); respite care level I (a pass-through billing task where [Petitioner] allows independent contractors who provide *non-healthcare* respite services to bill the Medicaid program with [Petitioner's] oversight) (Tr. at 37); respite care level II (the same *non-healthcare* services as respite level I but provided by [Petitioner's] employees) (Tr. at 40, 41); adult companion services (Tr. at 42); pre-authorized nursing services (Tr. at 43); day habilitation (Tr. at 45); community residential habilitation (provided by independent contractors) (Tr. at 47); qualified mental retardation professional services (Tr. at 48); annual medical exams (provided infrequently where [Petitioner] contracts with a non-employee physician) (Tr. at 50); comprehensive psychological evaluations (performed mostly by independent contractor psychologists) (Tr. at 51); initial social history intake (Tr. at 53); pre-vocational training (Tr. at 53); in-home oversight, supervision and monitoring (Tr. at 56); *non-healthcare* special projects (Tr. at 57); service coordination (Tr. at 58); and case management. (Tr. at 58).

The term "non-healthcare," which is italicized in the statement, is the only difference in the parties' factual statement. The Petitioner-taxpayer describes respite services, level I and II, and the "special projects" as non-healthcare related services. The Tax Commissioner maintains that they are healthcare related services.

In this decision, additional facts will be discussed as necessary to the legal analysis.

DISCUSSION

W. Va. Code § 11-13A-3(a) imposes a privilege tax on taxpayers who provide certain health care services. W. Va. Code § 11-13A-3(c) provides the following definition:

> (c) "Certain health care services" defined. -- For purpose of this section, the term "certain health care services" means, and is limited to, behavioral health services and community care services.

W. Va. Code § 11-13A-2 provides, in relevant part:

> (d) Specific definitions for persons providing health care items or services.
>
> (1) "Behavioral health services" means health care related services provided by a behavioral health center as defined in section one [§ 27-2A-1], article two-a, chapter twenty-seven of this code or section one [§ 27-9-1], article nine of said chapter.

W. Va. Code § 27-9-1 provides that no "hospital, center or institution, or part thereof" may provide any "inpatient, outpatient or other service designed to contribute to the care and treatment of the mentally ill or the mentally retarded, or prevention of such disorders," without first obtaining a license from the director of health. The Petitioner is licensed under the provisions of W. Va. Code § 27-9-1.

The Tax Commissioner takes the position that the Petitioner-taxpayer is a "behavioral health center" as defined by the legislative rules promulgated pursuant to the authorization of W. Va. Code § 27-9-1. These legislative rules provide, in relevant part:

> 4.4. Behavioral Health Services. - Those services intended to help individuals gain or regain the capacity to function adaptively in their environment, to care for themselves and their families, and to be accepted by society. This includes individuals with emotional or mental disorders, alcohol or drug abuse problems, and mental retardation or other developmental disabilities.
>
> 4.6. Center - An organization that provides behavioral health services, including all of its locations. In order facilitate simplicity of language within these rules, the term "center" as used herein includes "institution" or part of either a center or of an institution.

Since the Petitioner-taxpayer is licensed under the provisions of W. Va. Code § 27-9-1, these legislative rules apply to it. Unquestionably, it provides its clients "behavioral health services," as defined by 64 C.S.R. 11, § 4.4. As defined, "behavioral health services" encompass virtually any services provided to mentally retarded individuals. It is an "organization" providing "behavioral health services," thereby making it a "center," as defined by 64 C.S.R. 11, § 4.6. Under these legislative rules, the Petitioner is a "behavioral health center."

As a "behavioral health center," the Petitioner's gross income is taxable, insofar as it provides "behavioral health services," as defined by W. Va. Code § 11-13A-3(c). The "behavioral health services" that are taxable pursuant to W. Va. Code § 11-13A-3(a) are not as broad as the "behavioral health services" defined by 64 C.S.R. 11, § 4.4.

> If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).

Syl. pt. 4, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995). In this action, the statute is neither silent nor ambiguous. Rather, the Legislature has given some guidance respecting the scope of taxation of "behavioral health services:"

> We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. As we noted in Syllabus Point 2, in part, of *Chico Dairy Company v. Human Rights Commission*, [181 W. Va. 238, 382 S.E.2d 75 (1989)]:
>
> > 'Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the . . . [agency's] Rules and Regulations that it has in the statute.' Syl. pt.

4, *Ranger Fuel Corp. v. West Virginia Human Rights Commission*, 180 W. Va. 260, 376 S.E.2d 154 (1988).

Id. at 587, 466 S.E.2d at 438. While the definition of the term "behavioral health services" set forth in 64 C.S.R. 11, § 4.4 encompasses virtually any services provided to the mentally retarded, in order to be taxable pursuant to W. Va. Code § 11-13A-3(a), the "behavioral health services" must be health care related. Therefore, the Tax Commissioner may not simply tax the Petitioner's entire gross income under the privilege tax on the provision of certain health care services. It is necessary to consider each service provided by the Ppetitioner in order to determine if it is a "health care related service" subject to the tax.

Upon a review of the evidence, WVOTA is convinced that the only services provided by the Petitioner that are "health care related services" are nursing services, and the physical and psychological examinations which are provided on a periodic basis.[*] The nursing services and the physical exams relate to the physical health of the clients. The psychological examinations relate to the mental or psychological health of the clients. There is nothing in the statute to indicate that the health care related services are intended to be limited to benefiting the physical health of the clients.

Accordingly, it is **DETERMINED** that the gross income derived from the nursing services, physical examinations and psychological examinations provided to the Petitioner's clients is taxable under the privilege tax on the provision of certain health care services.

With respect to the other services provided by the Petitioner, their provision is by lay persons who must meet requirements that are not particularly onerous and which do not involve

[*] The evidence is that the Petitioner provides the physical and psychological examinations on a "pass-through" basis. Regardless of the fact that the Petitioner does not directly provide the service, it ensures that its clients receive all necessary examinations, which

any degree of medical or psychological training. Those requirements are basically that the individual be 18 years old, have a high school diploma, never have been convicted of a felony, have a valid West Virginia operator's license and have certain basic levels of training that are not medically related. In the provision of those services, any benefit to the health of the Petitioner's clients, if it exists at all, is so indirect and remote as to be incidental, at best. These services provided by the Petitioner do not qualify as health care related.

Accordingly, it is **DETERMINED** that the services provided by the Petitioner, other than nursing services, physical examinations and psychological examinations, are not health care related, and that the gross income derived therefrom is not subject to the privilege tax on the provision of certain health care services.

The Petitioner-taxpayer takes the position that the statute is ambiguous. It makes two arguments in this respect. First, it contends that the statute does not provide a definition of "behavioral health center." However, the mere fact that the tax statute, W. Va. Code § 11-13A-2(d)(1), does not provide an express definition of "behavioral health center" does not render it so ambiguous as to be invalid. The tax statute refers to W. Va. Code § 27-9-1. The reference to § 27-9-1 in the tax statute indicates that any definition of "behavioral health center" for purposes of § 27-9-1 is also applicable to the tax statute. While § 27-9-1 does not define "behavioral health center," the legislative rules promulgated pursuant thereto do provide a definition of "behavioral health center." It is a legitimate purpose of legislative rules to supply definitions that resolve ambiguities in statutes.

The Petitioner argues that the Legislature, in defining "behavioral health services" in W. Va. Code § 11-13A-2(d)(1), referred only to W. Va. Code § 27-9-1, and not the legislative rules

---

are health care related, ensures that these services are properly billed for, and that the provider is paid. The petitioner derives gross income for the provision of these services.

promulgated pursuant to that section. It contends that the failure of the "learned Legislature" to mention the legislative rules in the tax statute renders them inapplicable.

This argument disregards the principle that, "The Legislature when it enacts legislation, is presumed to know its prior enactments." *See e.g.* Syl pt. 2, *State v. Williams*, 196 W. Va. 639; 474 S.E.2d 569 (1996); and Syl. pt. 12, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). WVOTA is of the opinion that this principle applies equally to legislative rules promulgated by an administrative agency that have passed through the legislative process and which have been previously approved by the Legislature. Legislative rules have the same force and effect as statutes. Certainly the Legislature must be presumed to have knowledge of that which it has approved and which it has given status equal to that of statutes.

One of two situations existed in the present action. Either promulgation of that particular version of 64 C.S.R. 11 preceded passage of the tax statute, or passage of the tax statute preceded promulgation of that version of 64 C.S.R. 11. If it was the former, then the Legislature must be presumed to have known of the legislative rules, including the definitions set out above, and their applicability to the tax statute at the time they passed the tax statute. If it was the latter, then the Legislature must be presumed to have known of the effect that 64 C.S.R. 11, including the definitions, would have on the existing tax statute at the time that they approved the legislative rules. Application of the principle articulated in *Williams*, *supra*, and *Vest*, *supra*, to the present action leads to the conclusion that the Legislature was aware of the interaction between W. Va. Code § 27-9-1 and 64 C.S.R. 11, §§ 4.4 & 4.6, on the one hand, and W. Va. Code § 11-13A-2(d)(1), on the other. Therefore, the definition of "behavioral health center" to be gleaned from 64 C.S.R. 11 applies to W. Va. Code § 11-13A-2(d)(1).

From this discussion, it is apparent that the definition of the term "behavioral health center" is not so convoluted and circular as the definition considered in *CCIL v. Palmer*, 209 W. Va. 274, 546 S.E.2d 454 (2001). It does not render the statute void.

It is **DETERMINED** that the definition of "behavior health center," as set out in 64 C.S.R. 11, §§ 4.4 & 4.6, is applicable to that term as used in W. Va. Code § 11-13A-3(d)(1), and that § 11-13A-3(d)(1) is not ambiguous by reason of the use of that term.

The Petitioner also contends that W. Va. Code § 11-13(d)(1) is ambiguous because it does not define "health care related services." It maintains the failure to include a definition for "health care related services" renders that statute so ambiguous, that it is invalid. Its argument seems to be to the effect that any failure to define a term in a statute makes the statute so ambiguous as to render it invalid. This is simply not the law.

"In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 6, *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002); Syl. Pt. 1, *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds*, *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982). Thus, we must look to the common, ordinary and accepted meaning of the words used in the statute.

Webster's Third New International Dictionary, Unabridged, provides the following definition of "health:"

> **health** . . . *n* . . . **1 a :** the condition of an organism or one of its parts in which it performs its vital functions normally or properly : the state of being sound in body or mind . . . **2 b :** the condition of an organism with respect to the performance of its vital functions esp. as evaluated subjectively or non-professionally . . . **2 :** flourishing condition : WELL-BEING, VITALILTY, PROSPERITY . . .

> **health** . . . *adj* . . . **1 a :** of, relating to, or conducive to health

Webster's Third New International Dictionary, Unabridged, G. & C. Merriam Co., Springfield, Mass., 1966, p. 1043. This dictionary provides the following definition of "care:"

> **care** . . . *n* . . . **3 :** serious attention; *esp* : attention accompanied by caution, pains, wariness, personal interest, or responsibility . . . **5 :** CHARGE, SUPERVISION, MANAGEMENT : responsibility for or attention to safety and well-being
>
> **care** . . . *vb* . . . **2 a :** to give care (as to the safety, well-being or maintenance of a charge) : provide for or attend to needs or perform necessary personal services (as for a patient of a child)

Id. at 338. The dictionary further provides the following definitions of "relate" and "related:"

> **relate** . . . *vb* . . . **2 :** to show or establish a logical or causal connection between . . . **3 :** to be in relationship : have reference
>
> **related** . . . *adj* . . . **1 a :** having relationship : connected by reason of an established or discoverable relation

Id. at 1916.

From these definitions, one can reasonably arrive at a definition of the term "health care related." It seems apparent that the provision of nursing services, and physical and psychological examinations, bears a relationship or is connected to the giving of care or the provision of and attention to the needs of the Petitioner's clients. It is for the purpose of ensuring the soundness of the Petitioner's clients' minds and bodies, their well-being and their vitality. Applying the common, ordinary and accepted meaning of the term "health care related," it is evident that the nursing services, physical examinations, and psychological examinations are health care related.

As with the definition of the term "behavioral health center," it is apparent that the term "health care related" is not so convoluted and circular as the one considered in *CCIL v. Palmer*, *supra*. It does not render the statute void.

It is **DETERMINED** that when one applies the common, ordinary and accepted meanings of the words used in the term "health care related," the meaning of the term may be readily ascertained.

The gross income derived from the provision of physical examinations and psychological examinations is shown on Petitioner's Exhibits Nos. 1 through 4. A portion of the gross income derived from the provision of nursing services is also shown on Petitioner's Exhibits Nos. 1 through 4. However, it appears that the gross income for nursing services, as shown on Petitioner's Exhibits Nos. 1 through 4, does not accurately reflect the entire amount of gross income received from the provision of nursing services.

It appears that the Petitioner provided nursing services as part of its "special projects." It further appears that the income derived from nursing services attributable to each special project was reported on Petitioner's Exhibits Nos. 1 through 4 as part of the entire gross income attributable to that particular project. There is nothing to indicate that the gross income attributable to nursing services provided as part of special projects was reported as part of the gross income shown as a separate line item on Petitioner's Exhibits Nos. 1 through 4. Neither is there any indication that the gross income attributable to nursing services provided as part of special projects was separated out and reported as a part of some other line item on Petitioner's Exhibits Nos. 1 through 4.

Based on the evidence in the record, it appears that there is inadequate information for WVOTA to properly compute the amount of tax due. Consequently, as more fully set forth below, it will be necessary for the parties to confer and attempt to provide WVOTA with a computation of the proper amount of tax due and owing, based on the principles and determinations set forth in this decision.

CONCLUSIONS OF LAW

Based on all of the above, it is **DETERMINED** that:

1. The gross income derived by the Petitioner from the provision of and billing for nursing services, physical examinations and psychological examinations, as set forth in Petitioners' Exhibits 1 through 4, is subject to the tax on the privilege of providing certain health care services.

2. The gross income derived by Petitioner from the provision of and billing for nursing services related to "special projects" is also subject to the tax on the privilege of providing certain health care services. The units billed for nursing services related to special projects are set forth in Petitioners' Exhibits 5 through 18. The gross income derived from and billed for the special projects are set forth in Petitioners' Exhibits 1 through 4. However, there is no break down of the gross income derived from the various services provided as part of the special projects, so that the gross income from nursing services related thereto can be determined.

3. The term “behavioral health center,” as used in W. Va. Code § 11-13A-2(d)(1), is not ambiguous.

4. The scope of the term “health care related,” as used in W. Va. Code § 11-13A-2(c), may be readily ascertained by reference to the common, ordinary and acceptable meanings of each of those words.

DIRECTIVES RESPECTING COMPUTATION OF THE AMOUNT OF TAX DUE

1. In accordance with 121 C.S.R. 1, § 73.1.1, the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter;

2. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of the tax due and owing consistent with the opinions set forth above;

3. As stated above, the gross income derived by the Petitioner from the provision of and billing for nursing services, physical examinations and psychological examinations is subject to the tax on the privilege of providing certain health care services;

4. As stated above, the gross income derived by petitioner from the provision of and billing for nursing services related to "special projects" is also subject to the tax on the privilege of providing certain health care services;

5. The parties shall make every attempt to reach an agreement with respect to the amount of tax due in accordance with the above-stated opinion of the West Virginia Office of Tax Appeals, and the interest thereon;

6. If the parties are able to reach an agreement with the respect to the amount of the tax and interest due, then within 45 days of service of this decision, and in accordance with 121 C.S.R. 1, § 73.1.2, the parties shall file an agreed upon computation of tax due;

7. Any agreed upon computation of tax due shall set forth the following for each year during the audit period:

a. The amount gross income derived from the provision of and billing for nursing services;
b. The amount gross income derived from the provision of and billing for physical examinations;
c. The amount gross income derived from the provision of and billing for psychological examinations;
d. The total gross income derived from all three of these activities;
e. A computation of the tax on the gross income derived from all three of these activities; and
f. A computation of the interest due on the amount of said tax, through the date that is thirty days beyond the date on which the agreed upon computation is to be filed.

8. Any agreed statement of tax due shall also set forth the following:

   a. A succinct statement of the evidence in the record that will support the amounts of gross income with respect to each of the aforesaid taxable services from which the petitioner derives taxable gross income;
   b. A computation of the total tax due for the entire audit period; and
   c. A computation of total interest due for the entire audit period, computed through the date that is thirty days beyond the date on which the agreed upon computation is to be filed.

9. Within 15 days of service of this opinion, the parties are to confer for the purpose of making a preliminary attempt to identify any areas upon which the parties agree and any areas upon which they disagree;

10. Within 30 days of service of this opinion, the parties shall meet in an attempt to reach an agreement with respect to the computation of tax due in accordance with the above-stated opinion;

11. If the parties are unable to agree upon an amount of tax due, then in accordance with the provisions of 121 C.S.R. 1, § 73.2.1, and within 45 days of service of this opinion, either party may submit a computation of the amount of tax that it believes is due, and serve its computation on the West Virginia Office of Tax Appeals and on the other party;

12. If only one party submits a computation of the amount of tax it believes is due, the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.2;

13. If both parties submit a computation of the amount of tax they believe is due, either in accordance with the provisions of 121 C.S.R. 1, § 73.2.1 (where both parties file their computations simultaneously) or 121 C.S.R. 1, § 73.2.2 (where one party files its computation and other party files its computation in response), the Office of Tax Appeals shall proceed in accordance with the provisions of 121 C.S.R. 1, § 73.2.3;

14. Any computation submitted by the parties pursuant to 121 C.S.R. 1, § 73.2, shall contain all of the information required to be set forth any agreed computation of tax due, as more fully described in Paragraphs 7 and 8; and

15. If, after the submission of computations of the amount of tax due by both parties, either party believes that an evidentiary hearing is necessary, within 10 days of receipt of the opposing party's computation, it shall submit a request for an evidentiary hearing, clearly and succinctly setting forth the grounds upon which its request is based, and describing the nature of any evidence that it intends to introduce.

Upon receipt of an agreed upon computation of tax due, pursuant to 121 C.S.R. 1, § 73.1.2, or upon resolution of any dispute in the computations of tax due submitted by the parties, pursuant to 121 C.S.R. 1, §§ 73.2.1 & 2, the West Virginia Office of Tax Appeals will enter its the computation of tax due.